No. 79-158

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

HEPA CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 597 F. 2d 166. The decision and order of the National Labor Relations Board (Pet. App. 7-17) are reported at 232 N.L.R.B. 37. The report and recommendations of the hearing officer in the related representation proceeding (Pet. App. 18-32) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33-35) was entered on May 3, 1979. The petition for a writ of certiorari was filed on July 31, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether certain pro-union employees constituted an in-plant organizing committee that acted as an agent of the union and whether the conduct of those employees warranted setting aside a representation election won by the union.

STATEMENT

The California Teamsters Public, Professional and Medical Employees Union, Local No. 911, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the Union"), won a representation election among petitioner's employees by a vote of 48-15 (Pet. App. 9, 18-19). Petitioner filed timely objections to the election, alleging that certain employees, functioning as an in-plant organizing committee for the Union, intimidated, demeaned and threatened other employees who opposed the Union (Pet. App. 9-10). Petitioner also alleged that a union representative threatened an anti-union employee with police eviction from a meeting and that material misrepresentations of fact occurred during the campaign (Pet. App. 10).

A hearing was held to take evidence on petitioner's objections. The hearing officer concluded that the employees concerning whose activities petitioner had objected did not constitute an in-plant organizing committee (Pet. App. 21) and that no atmosphere of fear and coercion was created (Pet. App. 23). Thus, while "six to eight employees * * * were more vocal in their support than other employees favoring [the Union], and they attempted to convert other employees to their position" (Pet. App. 20), these employees were not authorized to act for the Union nor did other employees recognize them as agents of or acting for the Union (Pet. App. 20-21). The

only evidence of contact between the Union and any of these employees, other than at general union meetings, was the testimony of petitioner's production manager that he once observed two of these employees conversing with a representative of the Union after work (Pet. App. 20-21). The hearing officer further concluded that no threats of physical harm were made by any pro-union employee (Pet. App. 22) and that there was no evidence that a rumor which circulated just prior to the election that petitioner would discharge pro-union employees was attributable to or condoned by the Union or that it was given any credence by the employees (Pet. App. 30-31).

He also found that union representatives did not materially misrepresent the potential benefits of unionizing (Pet. App. 27-28) and that the incident in which police eviction from a union meeting was threatened—the employee was permitted to remain at the meeting—did not warrant setting aside the election (Pet. App. 24-25). The hearing officer ultimately concluded that all of petitioner's objections should be overruled. The Board adopted the findings and recommendation of the hearing officer and certified the Union (Pet. App. 1). Petitioner subsequently refused to bargain with the Union. The Board found that this refusal violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), and ordered petitioner to recognize and bargain with the Union (Pet. App. 7-17).

The court of appeals noted that flagrant misconduct on the part of a union-authorized in-plant organizing committee will invalidate an election. It found, however, that no such committee existed here. It also found that the record did not reveal any conduct by pro-union employees that could invalidate the election. Accordingly, it enforced the Board's order (Pet. App. 1-5).

ARGUMENT

Petitioner contends (Pet. 8-13) that the vocal pro-union employees should have been found to be an "in-plant organizing committee," as existed in *NLRB* v. *Georgetown Dress Corp.*, 537 F. 2d 1239 (4th Cir. 1976), and that their misconduct should have been imputed to the union, thus invalidating the election. This contention is without merit.

This case does not conflict with *Georgetown Dress*. There, the court concluded that, while the employees did not act under "express authority" from the union, the "union [was] chargeable with the misdeeds under the principle of apparent authority. The committee members in the eyes of other employees were the representatives of the union on the scene and the union authorized them to occupy that position." 537 F. 2d at 1244. Here, the court found that the employees "acted without union authorization and without apparent authority to act for the union" (Pet. App. 2). In *Georgetown Dress*, a formal In-Plant Organizing Committee was formed pursuant to a contact with a union organizer. The union had dinner meetings with Committee members, relied on the Committee for "soliciting employees to sign authorization cards [and] to attend Union meetings," and paid for campaign literature bearing the Committee's name. 537 F. 2d at 1242-1243. The court there specifically found that the Committee members were seen by the other employees as representatives of the union and were authorized by the union to occupy that position. *Id.* at 1244. Here, the other employees did not regard the employees alleged to be members of a committee as agents of the Union; moreover, the purported "committee members" had no meetings with the Union, and they were distinguishable

from other pro-union employees only in that they were more vocal.[1] Thus, the only issue actually presented by the petition is the correctness of the court's factual finding that no committee existed here, an issue that does not warrant review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). In any event, the hearing officer's conclusion, upheld by the Board and the court, that there was no in-plant organizing committee was correct.[2]

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[1]Moreover, the conduct in *Georgetown Dress*, *supra*, involving threats of violence and knife-wielding (537 F. 2d at 1241), was more flagrant than the conduct alleged here.

[2]There is no substance to petitioner's additional argument (Pet. 13-15) that the court failed to consider the cumulative impact of the alleged misconduct. The Board, upheld by the court, found no evidence of coercion or misrepresentations on the part of the Union or its representatives. The Board and the court held that the allegations against certain employees did not amount to misconduct that should invalidate the election.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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